UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) Case No. 97-0853-CR-Middlebrooks
v.	)
	) Magistrate Dubé
ATLAS IRON PROCESSORS, INC., et al.,	) (Amended order of reference dated May 7, 1998)
	)
	)
Defendants.	) **RESPONSE OF THE**
	) **UNITED STATES TO**
	) **OBJECTIONS OF DEFENDANT**
	) **ATLAS IRON PROCESSORS, INC.,**
	) **TO THE PRESENTENCE**
	) **INVESTIGATION REPORT**

I

INTRODUCTION

In this Memorandum, the United States responds to the numerous objections made by defendant Atlas Iron Processors, Inc. ("Atlas"), in response to the Presentence Investigative Report prepared by the United States Probation Office ("USPO"). The responses of the United States correspond with the paragraph numbers listed by Atlas.

In its preliminary statement, Atlas again rehashes its opinion that the difference between "picked-up" and "delivered" prices is important. The distinction drawn by Atlas bears no significance to this sentencing proceeding. Pursuant to the price-fixing and market allocation agreement reached at Sea Ranch, the defendants agreed on a maximum price that each co-conspirator would pay to specific suppliers of scrap and for various grades of scrap, both generally and with respect to particular suppliers. The fact that Atlas may have cheated on the agreement does not affect the volume of commerce attributable to it under U.S.S.G. §2R1.1. The

United States treats this red herring issue raised by Atlas fully in its response to paragraph 33 below.

II

RESPONSES TO OBJECTIONS

PART A. THE OFFENSE

The Offense Conduct

1. **Paragraph 5**: The Indictment charged that, beginning at least as early as October 24, 1992, and continuing at least until November 23, 1992, the exact dates being unknown to the grand jury, the defendants and co-conspirators engaged in a combination and conspiracy to suppress and restrain competition by fixing the price of scrap metal, and allocating suppliers of scrap metal, in southern Florida. Indictment, ¶ 2. In its Bill of Particulars, the United States stated: "By way of further explanation, the United States believes that the conspiracy alleged in the Indictment ended sometime in January, 1993." Bill of Particulars, p. 8. The evidence at trial clearly shows that the conspiracy continued into January, 1993. Moreover, U.S.S.G. §1B1.3 specifically provides that **all relevant conduct** be taken into consideration in determining the applicable guideline sentencing range.[1]

2. **Paragraph 6**: This objection is poorly taken. The uncontroverted testimony at trial was that Sunshine was Atlas' primary competitor in the Miami market.

3. **Paragraph 7**: The United States does not understand this objection. The Sea Ranch meeting occurred close enough in time to Hurricane Andrew to

[1] U.S.S.G. §1B1.3, Application Note 1, states: "The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guidleine range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator."

justify the statement that the price-fixing and market allocation agreement was struck shortly after Hurricane Andrew. Hurricane Andrew struck southern Florida on August 24, 1992. The evidence at trial showed the defendants met initially at Charcoal's restaurant on September 21, 1992, to discuss prices and customers relating to Hurricane scrap. A second meeting was held on October 14, 1992, at a restaurant called Casa D' Oro. Again, Hurricane scrap was discussed. Hurricane scrap was discussed at Sea Ranch.

4. **Paragraph 8**: Atlas would have this Court believe that the collusive deal struck at Sea Ranch just happened one day -- apparently out of the blue. That is not the case. Prior to the Sea Ranch meeting, there were two preliminary meetings between the defendants, one of which occurred at Charcoal's restaurant. The meetings at Charcoal's and Sea Ranch are directly connected to each other. Without question, the meeting at Charcoal's -- which occurred less than one month prior to the Sea Ranch meeting -- planted the seed for the defendants' collusion in southern Florida.

Henry Kovinsky testified at trial that a meeting took place on September 21, 1992, at Charcoals restaurant. Trial Transcript (Kovinsky), p. 1523-24. Participants at this meeting included the defendants Anthony Giordano, Jr., David Giordano and Randolph Weil. Id. at p.1523. Kovinsky described the Charcoal's meeting as a "kind of feeling out process." Id. Although the defendants may have talked about the possibility of a joint venture to salvage scrap relating to Hurricane Andrew, that was not the only subject discussed. Kovinsky testified as follows:

> Q: Now, you mentioned that at this Charcoals meeting, there was a discussion of a joint venture. Did you propose anything else at this Charcoals' meeting?
>
> A: Not too much. I think the Hurricane was the subject of the day. That certainly was on everybody's mind.
>
> But there was discussion at Charcoals about

> Hurricane pricing relative to Hurricane. I don't recall suppliers being mentioned or auto wrecking yards. *But I recall Hurricane pricing as it related to yard buying pricing, the scale pricing, as well as prices being offered down in the Hurricane area.*

Trial Transcript (Kovinsky), pp. 1525-26 (emphasis added).

Kovinsky testified at trial that Hurricane pricing was among the subjects discussed at the Sea Ranch meeting:

> Q: Now, were there different subjects discussed at the [Sea Ranch] meeting?
>
> A: Yes.
>
> Q: Do you recall what those subjects were?
>
> A: The subjects were Hurricane pricing, which was also discussed at prior meetings, but Hurricane pricing seemed to be a catalyst that was driving, at least from Randy's standpoint, and the Giordanos' meeting and talking about their -- where there was a tremendous amount of scrap that became available because of the Hurricane.

Trial Transcript (Kovinsky), p. 1505.

The meeting at Charcoal's was a preliminary meeting that opened the door to the collusive deal struck at Sea Ranch. Pursuant to U.S.S.G. §1B1.3, the Charcoal's meeting is relevant conduct to be considered in establishing the Guidelines' fine range for Atlas.

5. **Paragraph 9**: This objection is poorly taken. There is substantial evidence in the record to support the USPO's statement that as the result of the Charcoal's meeting, "[i]t was perceived that what Giordano, Jr. wanted was to fix prices first, see how that worked, and then possibly merge." PSI (Atlas), ¶ 9. A reference to this is contained in a calendar entry made by Henry Kovinsky dated

September 22, 1992 -- the day after the meeting at Charcoal's. See Trial Exhibit 2 (Kovinsky's calendar) ("Phoned Tony Giordano, Jr. -- Suggested merger as only way they are interested but want [to] crawl first then merge."). In addition to talking about a possible joint venture, Kovinsky testified: "You know, they talked Hurricane -- basically, Hurricane was a chief topic of discussion as well, on top of the merger and joint venture." Trial Transcript (Kovinsky), p. 1669. Hurricane scrap was also a major part of the discussion at Sea Ranch. Clearly, pursuant to U.S.S.G. § 1B1.3, the meeting at Casa D'Oro should be included as relevant conduct in establishing the Guideline offense level and the criminal fine to be imposed upon Atlas.

6. **Paragraph 10**: This objection is not well taken. Henry Kovinsky testified that on top of any merger or joint venture discussion, the defendants also talked about the Hurricane. Trial Transcript (Kovinsky), p. 1670. Hurricane scrap also was a principal part of the discussion at Sea Ranch. Id. at p. 1669. Clearly, pursuant to U.S.S.G. § 1B1.3, the meeting at Casa D'Oro should be included as relevant conduct in establishing the Guidelines' fine for Atlas.

7. **Paragraph 12**: This objection is groundless. Sheila McConnell's testimony on this subject is not ambiguous. McConnell testified as follows:

> Q: Was there any conversation between you and Tony Giordano, Junior on the drive up to Fort Lauderdale [for the Sea Ranch meeting]?
>
> A: Yes.
>
> Q: Can you tell the jury what that conversation was?
>
> A: Well, initially, he started that conversation by just general small talk, you know, asked me what was going on at the facility, what was going on generally in the market, and we talked at length about that.
>
> And then at some point I asked him where we were going and who we were meeting with, and

he said that we were going to meet with Sunshine Metal. Randy Weil in particular, he mentioned. And that it was -- he wanted me to fully understand that it was of great concern to him that I was attending this meeting, because I was not principal of any company at that time, of the two companies involved, and that Tony Giordano, Senior and Junior and Randy had grave reservations as to me attending the meeting, but that he felt that I needed to attend this meeting because he really wasn't familiar with the Miami market and he wanted me to make certain that I understood what Randy was referring to.

Q: Did Tony Giordano, Junior, did he tell you what the meeting was going to be about? Did he tell you the gist of the meeting on the drive up to Fort Lauderdale?

A: *He basically said that, you know, we are going to have a meeting to see what we can do about these prices. And with that, I was a little reserved about that. I said, well, to have that kind of meeting is illegal. And he just laughed.*

Q: Was there any other conversation?

A: Other than covering those subjects, no.

Q: Okay. And you say, you know, you said it was illegal?

A: Yes, I did.

Q: And he laughed?

A: Well, I was very concerned about it, because when he said we were having a meeting with Sunshine, all I could remember was that here is Cleveland all over again.

Trial Transcript (McConnell), pp. 135-37 (emphasis added).

Accordingly, the USPO's statement that while driving to the Sea Ranch meeting Giordano, Jr. indicated to McConnell that the purpose of the meeting was to fix prices is amply supported by the evidence adduced at trial.

8. **Paragraph 13**: This objection is misplaced. The evidence adduced at trial amply supports the USPO's statement that Anthony Giordano, Jr. and Atlas were part of a collusive agreement in Cleveland. Sheila McConnell testified that while she was employed by Luria Brothers, Giordano, Jr. called her superiors (Dave Wonkovich; Chip Hering; and/or Michael Gillespie) on at least 10 occasions and complained about McConnell's pricing and her quoting accounts that Giordano, Jr. claimed belonged to Atlas. Trial Transcript (McConnell), pp. 143-49. At the time, Luria Bothers was one of Atlas' major competitors in the Cleveland area, as well as its closest competitor. Id. at 146; 1042. McConnell testified that she, too, particpated in some of these telephone conversations on the speaker phone between Giordano, Jr. and her superiors at Luria Brothers. Id. at 144; 1091. McConnell described these telephone conversations as follows:

> Q; So the gist of these conversations were what? You say Tony [Giordano], Junior was involved?
>
> A: Yes, he had a problem with me quoting the accounts that were in close proximity to his yard. He would call Luria Brothers, specifically the people that I reported to, that were in charge of my activities, and say, what are you doing? You know, you are raising my price of cars over here, you know, you are quoting in my backyard. You know, what are you doing?

Trial Transcript (McConnell), p. 148. See also Trial Transcript (McConnell), pp. 1092-93.

McConnell testified that on at least one occasion, Giordano, Jr. specifically complained to her and her superiors that she was inflating the market price for scrap in Cleveland by quoting higher prices than Atlas. Trial Transcript

(McConnell), p. 1095. As the result of Giordano, Jr.'s complaints to her superiors, McConnell "was instructed not to actively and aggressively quote the accounts and not to solicit them." Id. at 149. McConnell testified that when she refused to stay away from Atlas accounts as instructed, she was fired from Luria Brothers. Id. at 1098.

The evidence adduced at trial clearly showed that Atlas and Giordano, Jr. transported their collusive methods and conduct from Cleveland to Miami. Indeed, their collusive conduct in Miami was strikingly similar to their collusive conduct in Cleveland.

9. **Paragraph 14**: This objection is groundless. Ben Tripodo testified at length about a meeting that occured at Atlas' headquarters in Cleveland in March, 1991. Trial Transcript (Tripodo), pp. 1416-1437. Tripodo testified while he was responsible for buying scrap for Luria Brothers, he was instructed by his superiors (Chip Hering and Dave Wonkovich) to attend a meeting with the Giordanos. Id. at 1432. According to Tripodo, this meeting was prompted by his soliciting an account in Shaker Heights, Ohio, an account which Atlas (and the Giordanos) believed belonged to Atlas. Tripodo was told by his superiors at Luria that they needed to meet with Atlas because "there was a problem with a scrap account for the shredder, and we needed to go over to discuss it." Id. at 1433. Anthony Giordano, Sr. began the meeting by stating: "*What the fuck is going on? I thought we had an understanding*." Id. at 1430 (emphasis added.) Tripodo testified that at this meeting, "[t]he nature of the discussion was scrap accounts that Tony, Senior believed was theirs and that we should stay away from." Id. at 1431. The following colloquy took place:

> Q: Mr. Tripodo, based on what you saw and heard at the meeting, was there anything resolved or agreed to?
>
> A: Yes. Basically, the *agreement* was that Mr. Hering, Chip Hering would have a discussion with me. It

was a misunderstanding. I was new -- I was new myself, being on this side of the business, that they would have a talk with me to get it straightened out. And that was basically the end of that conversation.

Trial Transcript (Tripodo), pp. 1431-32.

After this meeting took place, Tripodo reported the incident to the president of Luria Brothers, Bob Hahn. Trial Transcript (Tripodo), pp. 1434-35. After Bob Hahn got back to Tripodo, Tripodo instructed his subordinate (John Head) that he was free to call on all accounts: "[T]here was no account off the sheet or out of bounds, and especially the Shaker Heights account." Id. at 1436.

10. **Paragraph 15**: This objection is poorly taken. McConnell testified that Giordano, Jr. gave her a price list that originated from Luria Brothers (Atlas' main competitor in Cleveland) and was sent to Anthony Giordano, Jr. via fax. Trial Transcript (McConnell), pp. 427-28. See Government Exhibit 3. McConnell testified that there were handwritten notations made on the price list -- in a handwriting that she recognized as Michael Gillespie's of Luria Brothers. Id. at p. 429. McConnell then testified as follows:

Q: You say Tony, Junior gave you this?

A: Yes, he did.

Q: Did he ask you to do anything with it?

A: He told me to take a look at it and see if I could do anything.

Q: What was your understanding of what he wanted you to do?

A: He wanted me to compare my pricing with their pricing and, in general, not overpay.

Trial Transcript (McConnell), pp. 429-430.

11. **Paragraph 16**: This objection is not well taken. Henry Kovinsky

testified as follows about the Sea Ranch meeting:

> I remember Randy [Weil] really accusing, almost, the Miami River Recycling, Giordanos and Sheila, mainly, for running after Danielli, for example, and giving prices or suggesting prices that were higher than what the marketplace should be.

Trial Transcript (Kovinsky), p. 1506.

The following colloquy also took place with Kovinsky:

> Q: When you left the meeting, did you have an understanding that Mr. Giordano, Senior had any objection to what was said at the meeting or what was agreed upon?
>
> A: No, there is no objection from anybody. If there is any objection from -- it would be that maybe Randy knew a lot more to the market, the pricing than they did, and maybe they objected to the way Randy felt that their prices were inappropriate to the market price.
>
> They certainly objected to Mr. Weil's acumen and telling them that they are *overpaying and don't know what they are doing in the business*, and I heard that on several occasions, both at Sea Ranch and before the Sea Ranch.

Trial Transcript (Kovinsky), p. 1515 (emphasis added).

The evidence adduced at trial clearly supports the USPO's statement that the purpose of the meeting was for Atlas and Sunshine to lower their prices. Indeed, defendant Randolph Weil insisted at Sea Ranch that Atlas and the Giordanos were overpaying for scrap. The record amply shows that Weil was concerned about its main competitor -- Atlas -- overpaying for scrap. By overpaying for scrap, Atlas forced Sunshine to raise its prices or risk losing suppliers. There is ample evidence in the record to support the proposition that in the scrap metal industry, the

profitability of companies like Atlas and Sunshine is dependent on how cheaply scrap can be purchased.

In addition, Sheila McConnell testified that, at the time of the Sea Ranch meeting, she was aggressively quoting higher prices in the market. Trial Transcript (McConnell), p. 191. According to McConnell, "There was basically a *price war* going on at that time." Id. (emphasis added). McConnell further testified that the market with respect to car suppliers had gotten particularly high. Id.

As the jury found, this competitive situation in Miami was resolved by the defendants' collusive agreement reached at Sea Ranch.

12. **Paragraph 17**: This objection concerning the existence of McConnell's notes is ridiculous. McConnell testified that Giordano, Jr. directed her to take notes of the agreement reached at Sea Ranch and she did as she was told. Trial Transcript (McConnell), pp. 195-96. See Government Exhibit 1 (McConnell's notebook containing notes of the Sea Ranch meeting, dated October 24, 1992); Government Exhibit 1(a) (McConnell's notes of the Sea Ranch meeting). Indeed, McConnell's testimony about her notes of the Sea Ranch meeting -- and events related to these notes -- run from pages **193 to 243** of the trial transcript. The fact that Henry Kovinsky may not recall anyone taking notes at a meeting that took place nearly six and a half years prior to his testimony in no way supports Atlas' preposterous argument that McConnell did not take notes at Sea Ranch. As was the case at trial, the authenticity of McConnell's notes remain unquestioned.

Moreover, the statement by Atlas that it has "never denied" the existence of the Sea Ranch meeting is misleading. Atlas and the Giordanos hotly contested -- and continue to contest -- the central fact that at Sea Ranch, Atlas and its co-conspirators agreed to fix prices and allocate suppliers and territories. Still, Atlas denies any involvement or particpation in the charged collusive agreement. Atlas and its principals simply refuse to acknowledge that they violated the law and choose to ignore the fact that a jury found otherwise.

13. **Paragraph 20**: This objection is not well taken. McConnell testified that, at the Sea Ranch meeting, it was agreed that Atlas and the Giordanos would stay away from suppliers located on Cairo Lane, which was the street on which Sunshine was located, and in exchange Atlas would receive a shipment of cars originating from the Bahama Islands. Trial Transcript (McConnell), pp. 163-65. This more than qualifies as a *quid pro quo* arrangement.

14. **Paragraph 21**: Atlas continues to be confused by the difference between the illegal agreement and its implementation. McConnell testified at trial that, at the Sea Ranch meeting, the defendants agreed on the maximum price that it would pay for various grades of scrap, commonly referred to as scale prices. McConnell testified:

> Q: Now, what was talked about next at this [Sea Ranch] meeting?
>
> A: At that juncture of the meeting, we had basically finished discussing the Bahamas cars and Cairo Lane, and they felt at that time they had pretty much covered all of the car carriers in given areas that were to be priced a certain way.
>
> And then Tony Giordano, Senior brought up the pricing of the scale. He said in as much as we have gotten this far, why don't we just -- just discuss the scale and see what we can do there. We might as well do the whole thing.
>
> Q: What do you mean by "scale?"
>
> A: Scale is the general pricing that you have to the general public for various grades of scrap that they would generate, in addition to buying from the auto wreckers and towers.

Trial Transcript (McConnell), p. 223.

McConnell testified that, at the Sea Ranch meeting, the defendants fixed the maximum scale price each would pay for the following grades of scrap: (1) appliances ($20/net ton); (2) sheet metal ($26/net ton); (3) unprepared #2 ($30/net ton; (4) prepared #2 ($38/net ton); (5) unprepared #1 ($30/net ton); and (6) logs ($35/net ton). Trial Transcript (McConnell), pp. 227-29. McConnell's trial testimony is the same as her grand jury testimony.

The colloquy cited by Atlas proves nothing other than that Atlas cheated on the agreement. The lack of full implementation, however, does nothing to undercut the central fact that Atlas and the defendants fixed the maximum price that each would pay for various grades of over-the-scale scrap. Moreover, Sunshine did follow the agreement on scale prices, and the co-conspirators are liable for Sunshine's collusive conduct as well.

15. **Paragraph 24**: This objection is not well taken. There is ample evidence in the record to support the USPO's statements that Atlas needed a certain amount of tons for its shredder and, further, that one of the goals of the conspiracy was to satisfy the Giordanos' request for a certain volume of tons. Kovinsky testified that, among other things, the subject of tonnages was discussed and agreed-upon at Sea Ranch. Trial Transcript (Kovinsky), p. 1505-06. Kovinsky testified:

> Q: What were the other subjects [discussed at Sea Ranch]?
>
> A: The other subjects were suppliers, their pricing. And there was some tonnage. I really don't know how to describe this. I don't know that it was a formula, that the Giordanos were rather insistent on getting X amount of tons. How those tons were made up, I really couldn't tell you, not being involved.

> But there was some magic tonnage figure of 3, 4,000 tons, or whatever that was, per month. If they could get assurances from Randy [Weil] that that tonnage would be available, then they would cooperate and work with the pricing, work with the suppliers, work with the territories, geographical territories.

Trial Transcript (Kovinsky), pp. 1505-06. See also Trial Transcript (Kovinsky), p. 1512. Kovinsky's testimony is clear, Atlas wanted a certain amount of tonnage in order to agree to lower prices. Id. at 1512.

In support of its ill-conceived argument, Atlas cites to a part of Kovinsky's testimony having nothing to do with the Sea Ranch meeting whatsoever. In paragraph 15 of its Objections, Atlas cites to page 1667 of the trial transcript. This colloquy is limited to the meeting at Casa D'Oro; it has nothing to do with the tonnage arrangement which the Giordanos insisted upon at Sea Ranch. Kovinsky's testimony that the defendants talked about tonnages at Sea Ranch remains uncontroverted.

16. **Paragraph 28**: This objection is not well taken. The description of events contained in this paragraph is consistent with McConnell's testimony. McConnell testified that, after the Sea Ranch meeting, she and Giordano, Jr. went back to Atlas' office in Miami. Trial Transcript (McConnell), pp.159, 181. Giordano, Jr. and David Giordano met in David's office behind closed doors. Id. at 182. After David Giordano met with his brother, McConnell testified that David exited his office and exclaimed: "[D]rop the prices." Id. at 183; 298. Consistent with the Sea Ranch agreement, McConnell testified she "went to [her] office to start dropping [prices]." Id. at 298. The fact that not all scale prices were dropped -- because Atlas cheated on the agreement -- is not relevant. The evidence at trial conclusively established that, consistent with the Sea Ranch agreement, Atlas did drop prices on cars (both flattened and whole) and certain grades of scrap.

17. **Paragraph 30**: Again, Atlas confuses the illegal agreement with its implementation. McConnell testified that the defendants agreed to drop their prices. The documents (scale tickets and summaries of scale tickets) conclusively establish that the defendants did, in fact, drop their prices pursuant to the collusive agreement. In particular, Atlas followed the agreement most closely with respect to the agreed-upon prices to be paid to car suppliers. In many cases, the prices actually paid to the car suppliers by the defendants were identical.

Atlas continues, however, to confuse issues with its muddled argument about the difference between "delivered" and "picked-up" prices. Again, this issue concerns only the implementation of the illegal agreement; it does not undercut in any way the uncontroverted testimony of McConnell and Kovinsky that the defendants struck a deal at Sea Ranch fixing the maximum price to be paid to specific suppliers, fixing the maximum price to be paid to suppliers within specific geographic areas, and fixing the maximum price to be paid for specific grades of scrap.

18. **Paragraph 33**: This objection concerning the volume of commerce affected by the conspiracy is not well taken. The United States submits that, based on the evidence, the volume of commerce affected by the conspiracy and attributable to Atlas is $614,436.39. See U.S.S.G. §2R1.1. Clearly, U.S.S.G. §1B1.3 provides that all relevant conduct may be considered in establishing the appropriate Guidelines offense level and the concomitant criminal fine.

Atlas' reliance on United States v. SKW Metals & Alloys, Inc., 4 F. Supp. 2d 166, 167 (W.D.N.Y. 1997) ignores contrary relevant law. In United States v. Hayter Oil Co., Inc., 51 F.3d 1265 (6th Cir. 1995), the Sixth Circuit agreed with the government's conclusion that "there is nothing in the language of the Antitrust Guideline [U.S.S.G. §2R1.1,] that suggests that the Sentencing Commission intended the district court 'exclude from a defendant's volume of commerce sales of a product that was the direct object of a price-fixing agreement, because those sales

were made at less than the agreed-upon price.'" Hayter Oil, 51 F.3d at 1273. Rather, the court in Hayter Oil held:

> Construing the plain language of the Antitrust Guideline, we conclude that the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price.

Hayter Oil, 51 F.3d at 1273.

The Hayter Oil court found its conclusion about the application of the Antitrust guideline to be "consistent with the purposes of the Sherman Act." Hayter Oil, 51 F.3d at 1273. The court acknowledged that all price-fixing agreements are illegal *per se.* Id. The Court in Hayter Oil posited the following:

> It would be an anomaly to declare price-fixing illegal per se, without regard to its success, merely because of its plainly anticompetitive effect, but to provide for a fine only if the price-fixing were successful. Such a rule would result in the government being relieved of the burden of ascertaining a conspiracy's effect and success for purposes of obtaining a conviction only to have to bear that very burden to establish the propriety of any fine.

Hayter Oil, 51 F.3d at 1274.

In addition, the court in Hayter Oil found that its interpretation of U.S.S.G. §2R1.1 is entirely consistent with the Sentencing Commission's Commentary to the Antitrust Guideline, which is to be given controlling weight so long as it does not violate the Constitution or a federal statute. Hayter Oil, 51 F.3d at 1274. The court stated that it "clearly appears that the Sentencing Commission intended that the

government have the benefit of a per se rule both at trial and at sentencing to avoid the protracted inquiry into the day-to-day success of the conspiracy." Id. Accordingly, the court in Hayter Oil rejected the defendants argument that the volume of commerce attributable to them consisted of only the 40 weeks when the conspirators successfully achieved their target price, and instead held that the volume of commerce for purposes of sentencing under U.S.S.G. §2R1.1 involved "all sales of gasoline made by the defendants during the entire 234-week period of the conspiracy." Id.

Atlas also ignores the recent decision in United States v. Michael D. Andreas, *et al.*, 1999 WL 51806 (N.D. Ill.), in which the court followed the reasoning of the Sixth Circuit in Hayter Oil and expressly rejected the district court's reasoning in SKW Metals. Andreas, at *2. In Andreas, the court concluded that the decision in SKW Metals "is flawed because it imposed a narrow construction of affect based on an erroneous interpretation of §2R1.1's background and application notes." Andreas, at *2. The court stated: "Indeed, the application notes clearly demonstrate that affect should be broadly construed in a manner to effectuate the per se rule." Id. According to the Andreas court,

> Whether the agreement actually caused the objective price increase is irrelevant because the definition [of "affect"] neither guarantees nor requires the causal force to induce a response or reaction. Instead the stimulus must present a possible response or reaction. Hence, the plain meaning permits a broad construction to attach liability even if there is only a theoretical affect on commerce, regardless of its actual effect on the price of lysine.

Andreas, at *2.

Accordingly, the court held consistent with Hayter Oil that, for sentencing purposes under U.S.S.G. §2R1.1, all domestic lysine sales made by the Archer

Daniels Midland Corporation during the scope of the conspiracy should be included as volume of commerce attributable to the defendant, Michael Andreas. Andreas, at *3.

Accordingly, the United States submits that all of the scrap purchases made by Atlas during the scope of the conspiracy, and which were affected by the price-fixing and market allocation agreement, are properly included as volume of commerce under U.S.S.G. §2R1.1. The categories of scrap unequivocally affected by the conspiracy include the following: (1) flattened cars, including the specific suppliers listed in McConnell's notes; (2) whole cars; (3) appliances; (4) sheet metal; (5) unprepared #2; (6) prepared #2; (7) prepared #1; and (8) logs. Each of these grades of scrap were objects of, and subject to, the conspiracy. In addition, the United States submits that the category of scrap which Atlas referred to as "shred" should also be included in the volume of commerce. Because Atlas classified its scrap differently than Sunshine, this "shred" grade included the agreed-upon prepared and unprepared grades of scrap.[2] At the sentencing proceeding, the United States will introduce detailed summaries setting forth the volume of commerce affected by the conspiracy.

The documents (i.e., scale tickets and summaries) admitted at trial show the conspiracy continued at least through December 31, 1992. Though there was some cheating on the agreement, mostly by Atlas, there was no affirmative withdrawal from the conspiracy by either Atlas or Sunshine before December 31, 1992. In January, 1993, however, the documents admitted at trial show that the conspiracy began to break down.

Using the scale tickets and other business records of Atlas, the United States has added up the volume of commerce affected by the conspiracy and attributable to Atlas. That figure is **$614,436.39**.

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[2] For example, Atlas did not classify its scrap as “appliances,” "unprepared #2," "prepared #2," "prepared #1."

Atlas' argument that its freight costs should be deducted from the volume of commerce attributable to Atlas finds no support in U.S.S.G. §2R1.1 or the case law. The figures used by the United States in calculating the volume of commerce attributable to Atlas are the actual amounts paid to suppliers for the scrap. These actual amounts represent the true amount of the volume of commerce affected by the conspiracy. You would no more deduct freight costs from the volume of commerce than you would any other internalized cost (e.g., plant, power, equipment, labor, etc.).

Accordingly, pursuant to U.S.S.G. §2R1.1, the United States agrees with the method used by the USPO in arriving at the volume of commerce affected by the conspiracy and attributable to Atlas for sentencing purposes.[3] In addition, Atlas' contention finds no support in U.S.S.G. §1B1.3, which provides that all relevant conduct should be included in arriving at the volume of commerce attributable to Atlas.[4] Atlas attempted to confuse the jury with its "picked-up" versus "delivered

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[3] For sentencing purposes, the figures used by the United States in calculating the volume of commerce attributable to Atlas are the actual dollar amounts paid by Atlas to its suppliers of scrap. These actual amounts represent the true amount of the volume of commerce affected by the conspiracy. You would no more deduct freight costs from the volume of commerce than you would any other internalized cost (e.g., plant, power, equipment, labor, etc.). Pursuant to U.S.S.G. §2R1.1, all scrap purchases made by Atlas affected by the conspiracy should be included as volume of commerce attributable to Atlas for sentencing purposes. See, e.g., United States v. Hayter Oil Co., Inc., 51 F.3d 1265 (6th Cir. 1995); United States v. Michael D. Andreas, *et al.*, 1999 WL 51806 (N.D. Ill.).

[4] Furthermore, according to the trial testimony, the agreed-upon prices represented "delivered" prices, i.e., it was assumed that if the conspirators picked up the scrap, the cost of the freight would be deducted from the agreed-upon price. McConnell testified that she did not want to go along with the conspiracy so, whenever Atlas picked up scrap, McConnell did not further reduce the price Atlas paid by deducting freight costs. She did not do so because she wanted to cheat on the agreement to ensure supply to Atlas. Because this is a buy-side conspiracy, her cheating actually increased the dollar volume of commerce affected by the conspiracy and attributable to Atlas. Atlas should not now be allowed for sentencing purposes to decrease their volume of commerce to offset the fact that, during the conspiracy, their cheating increased the volume of commerce.

pricing" spiel, but failed. Its attempt to confuse issues at sentencing with the same spiel should also fail.

Role Assessment

19. **Paragraph 34**: For the reasons stated above in Paragraph 18, this objection is not well taken. Pursuant to U.S.S.G. §2R1.1, the volume of commerce attributable to Atlas is $614,436.39.

Victim Impact

20. **Paragraph 40**: The United States does not understand Atlas' objection. Based on the business records provided by Atlas and admitted into evidence at trial, the United States has counted at least 1,271 different victims of the conspiracy. These victims are comprised of suppliers who made sales to Atlas during the conspiracy period. Though it is true some of these victims cannot be located, it is true that Atlas' records show they were victimized by the conspiracy, since they sold to Atlas scrap that was subject to the illegal agreement reached at Sea Ranch.

21. **Paragraph 41**: With respect to this objection, perhaps a clarification is needed. The United States has estimated that the amount of underpayment in this case to identifiable victims is $80,013. The time period used was October 24, 1992, through December 31, 1992, the period under which the conspiracy was in effect. The United States simply compared the last pre-Sea Ranch price for each supplier with the fixed prices. For example, in calculating the loss to Bubba's, a car supplier, the United States compared the last non-fixed price of $65 (pre-Sea Ranch) with the agreed-upon price of $52. In this case, Bubba's price was dropped $13 per ton. We then multiplied the tons of scrap Bubba's sold to Atlas during the conspiracy period by this differential figure ($13). No decrease was made for freight allowances, since no such decrease is appropriate under U.S.S.G. §2R1.1.

22. **Paragraph 43**: This objection is not well taken. Using the methodology set forth above in Paragraph 21, the United States calculated the loss

(i.e., underpayment) to identifiable car suppliers (all larger flattened suppliers) to be $45,013.

23. **Paragraph 44**: This objection is not well taken. Using the methodology set forth above in Paragraph 21, the United States calculated the loss (i.e., underpayment) to identifiable whole car suppliers to be $4,470.

24. **Paragraph 45**: This objection is not well taken. Using the methodology set forth above in Paragraph 21, the United States calculated the loss (i.e., underpayment) to identifiable sheet metal suppliers to be $5,328.

25. **Paragraph 46**: This objection is not well taken. Using the methodology set forth above in Paragraph 21, the United States calculated the loss (i.e., underpayment) to identifiable log suppliers to be $1,362.

26. **Paragraph 47**: This objection is not well taken. Using the methodology set forth above in Paragraph 21, the United States calculated the loss (i.e., underpayment) to identifiable shred suppliers to be $23,840.

PART B. PRIOR HISTORY OF MISCONDUCT

Similar Misconduct

27. Paragraph 58: Atlas' objection is groundless. There is ample evidence in the record that Atlas and the Giordanos participated in a collusive agreement in Cleveland. Sheila McConnell and Ben Tripodo both offered compelling evidence of a conspiratorial agreement in Cleveland between Atlas and its main competitor, Luria Brothers. As provided above, both McConnell and Tripodo testified at trial that they participated in meetings involving Atlas officials, namely, Anthony Giordano, Jr. and Sr., the purpose of which were to facilitate collusion. The USPO's statement as to "similar misconduct" is entirely accurate and, indeed, uncontroverted.

PART C. ORGANIZATIONAL CHARACTERISTICS

Organizational Data

28. **Paragraph 61**: The United States understands that Jerry Nalipa, a former officer of Atlas, asked to be removed as an officer as the result of the indictment, that led to Atlas' conviction at trial. The United States, however, has not received the information claimed to have been provided to the USPO.

29. **Paragraph 63**: The United States offers no response to this trivial issue, though it is true that the category of non-ferrous scrap is broader than simply aluminum, copper and zinc.

30. **Paragraph 65**: The United States has not been provided with any information by Atlas to confirm or deny its claim that it has only 100 employees for all of its entities. For sentencing purposes, however, the number of employees that matter are those working for Atlas during the time of the conspiracy. This is a factor for purposes of calculating Atlas' culpability score under U.S.S.G. §8C2.5(b).

31. **Paragraph 66**: The United States has not been provided with any information by Atlas to confirm or deny its claim that it has only 5 employees working at Best-Atlas, an affiliated entity. For sentencing purposes, however, the number of employees that matter are those working for Atlas during the time of the conspiracy. This is a factor for purposes of calculating Atlas' culpability score under U.S.S.G. §8C2.5(b).

32. **Paragraph 69**: The United States has not been provided with any information by Atlas to confirm or deny its claims in this objection.

Financial Condition: Ability to Pay

33. **Paragraph 73**: The United States has not been provided with a copy of the tax record at issue and, therefore, has no ability to assess the merits of this objection.

34. **Paragraph 74**: The United States has been provided with minimal financial information, insufficient in detail to assess the merits of this objection. The

United States was not given the financial information provided to the USPO. At the sentencing hearing, however, the United States intends to be prepared to call a financial analyst to demonstrate Atlas' ability to pay a fine within the Guidelines' range.

35. **Paragraph 75**: The United States has not been provided with any information sufficient to assess the merits of this objection. The United States was not given the financial information provided to the USPO. At the sentencing hearing, however, the United States intends to be prepared to call a financial analyst to demonstrate Atlas' ability to pay a fine within the Guidelines' range.

36. **Paragraph 78**: This objection is misplaced. It is not a certainty that Atlas will be forced to liquidate if each of the Giordano defendants are sentenced to the jail time mandated under the Sentencing Guidelines. One alternative is for Atlas' creditors -- i.e., their banks -- to put in place a custodian to run the business while the Giordanos serve their respective jail sentences. Clearly, the Giordano family has done a poor job of running their scrap metal businesses in Miami and Cleveland. A temporary custodian could do no worse. Perhaps what Atlas needs is new management, not more of the same. Another alternative may be to stagger certain sentences to ensure that one of the Giordanos is able to run the business full time while the others serve their jail time.

Atlas' argument that 100 families will lose employment if the company goes out of business is speculative and unfounded. Obviously, there is no guarantee that the company will survive, regardless of whether the Giordanos are sentenced to jail. It is a poorly run company. Indeed, the United States understands that Atlas is in the process of selling its scrap metal business. If so, what guarantees have been given to these 100 families to ensure their continued employment if a new owner takes over?

As the Court well knows, the sad fact is that criminals routinely hurt innocent people. Even when criminals are sent to jail, it usually hurts innocent

people as well. There is nothing unique about the circumstances here. The alternative suggested by Atlas -- which is to forego punishing the individuals who formed then implemented the conspiracy for which they were convicted -- is a poor option that sends the wrong message to society. The argument promoted by Atlas (i.e., that the status of the company should control the sentences imposed on the individuals) allows the Giordanos to act with impunity and without regard to having to operate a business and conduct themselves in a legal manner. Their argument amounts to saying the court should not send to jail people who own companies or who have power and influence. Clearly, any such argument should fail.

Nor does the United States think much of Atlas' argument that if it exits the markets in Miami and Cleveland, there is a possibility that a monopoly may be created. First, the supposition that Atlas and the Giordano family are good for competition is indeed ironic. Atlas and its officials colluded in Miami, and they did so in Cleveland. They are proven colluders who have promoted anticompetitive conduct when convenient for them to do so. Second, the United States has no reason to believe that a monopoly situation will be created or, more importantly, be maintained in any market as the result of Atlas and the Giordanos serving their jail time. The United States does not hold the self-serving view of Atlas and its principals that the demise of Atlas will effectively end competition in the ferrous scrap recycling industry.

PART D. GUIDELINE APPLICATIONS

Specific Offense Characteristics and Total Offense Level

37. **Paragraphs 82 and 83**: Under U.S.S.G. §2R1.1, the volume of commerce is $614,436.39. This is the basis for the one point increase to the base offense level. Since the fine will be based on U.S.S.G. §2R1.1(d), a special instruction relating to organizations, it is unnecessary to calculate the offense level

for Atlas. Under the Guidelines, the base fine for Atlas will be 20 percent of the affected volume of commerce, here $122,687.27. See U.S.S.G. §2R1.1(d). The culpability score is eight (8). PSI (Atlas), ¶ 86. See also U.S.S.G. §8C2.5. The minimum multiplier is 1.60 and the maximum multiplier is 3.20. PSI (Atlas), ¶ 93. See also U.S.S.G. §8C2.6. Thus, under the Guidelines the range for the criminal fine for Atlas is between $196,299.63 and $392,601.18. See PSI (Atlas), ¶ 94.

Base Fine Calculation

38. **Paragraph 84**: This objection is misguided. The base fine in this case is determined by U.S.S.G. §2R1.1(d). In citing United States v. O'Hare in its memorandum, Atlas confuses a sentencing hearing under the alternative fine provision, 18 U.S.C. § 3571(d), with the garden variety, straight-forward application of U.S.S.G. § 2R1.1(d). This special instruction is designed to uncomplicate antitrust sentencing by eliminating the need to show actual pecuniary loss. U.S.S.G. §2R1.1, Application Note 3. Accordingly, pursuant to U.S.S.G. §2R1.1(d), "20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3)." U.S.S.G. §2R1.1(d), Application Note 3.

The United States will have a financial analyst at the sentencing hearing prepared to rebut any claim that Atlas cannot afford to pay the criminal fine provided for under the Guidelines.

39. **Paragraph 86**: The United States is relying on the USPO's evaluation that Atlas had more than 200 employeees at the time of the charged conspiracy. If so, then the three (3) point enhancement is appropriate for purpose of determining its culpability score. In any event, Atlas at least had 50 employees at the time of the charged conspiracy. Accordingly, at a minimum, a two (2) level enhancement is called for under U.S.S.G. §8C2.5(b)(4). If so, then the culpability score would be seven (7), not eight (8). And the multipliers would be 1.40 and 2.80. U.S.S.G. §8C2.6.

Total Culpability Score

40. **Paragraph 92**: The United States addressed this objection in paragraphs 84 and 86 above.

Fine Range Computation

41. **Paragraph 93**: The United States addressed this objection in paragraphs 84 and 86 above.

42. **Paragraph 94**: If the culpability score is eight(8), then the criminal fine range for Atlas is $196,299.63 to $392,599.26. If the culpability score is seven (7), then the criminal fine range for Atlas is $171,762.17 to $343,524.35.

Fine Adjustment

43. **Paragraph 95**: This objection is not well taken. Disgorgement is appropriate under U.S.S.G. §8C2.9. The United States intends to show loss to victims at the sentencing proceeding. To the extent restitution is not imposed, or not imposed fully, the United Stsates submits that the amount of any gain that is not taken from Atlas for remedial purposes should be added to the criminal fine.

44. **Paragraph 100**: For the reasons stated above, this objection is not well taken.

45. **Paragraph 102**: This objection is misguided.

46. **Paragraph 103**: This objection is unfounded. The United States agrees with the USPO's statement that there are no factors that warrant a departure in this case. PSI (Atlas), ¶ 103. As discussed above, there is no basis to believe that "100 jobs" will be lost in Northeast Ohio and Florida if Atlas is required to pay a criminal fine called for under the Guidelines. Nor is there any guarantee that these "100 jobs" will be spared regardless of whether a Guidelines' fine is imposed. The United States understands that the Giordanos have shopped Atlas on the market for some time and are close to consummating the sale of Atlas. In addition, based on its collusive track record in Miami and in Cleveland, the United States does not view Atlas as a champion to promote competition in any market. If

Atlas were to exit a market, presumably another scrap recycler would enter that market and fill the breach. The rhetoric that a "monopoly" may arise in Miami or Cleveland if a Guidelines' fine is imposed on Atlas is not only unfounded, but so speculative as to be ridiculous. The chance of recidivism on the part of Atlas and the Giordano family is at least as great as the possibility of the creation of a short-lived monopoly.

III

CONCLUSION

For the reasons stated above, Atlas' objections are not well taken. The United States will submit its sentencing recommendation shortly.

Respectfully submitted,

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